

WOON SOON FATT & ANOR.**v.****CHONG YONG**

HIGH COURT MALAYA, JOHOR BAHRU

MAHADEV SHANKAR J

[CIVIL SUIT NO. 174 OF 1983]

16 APRIL 1984

LANDLORD AND TENANT: *Action for repossession of premises - Whether tenant had equity in the premises.*

CIVIL PROCEDURE: *Application for certificate under s. 68, Courts of Judicature Act - Direction to list matter for further argument in open Court though order a final order - Error regarding nature of order - Effect.*

The plaintiffs ("the landlords") brought an action for repossession of a shop-house in Kluang. The Defendant ("the tenant") was a tenant of the premises until 29 February 1983. The tenant, however, claimed he had an equity in the premises arising from a written agreement dated 14 February 1954 between him and one Batcha Sahib. The agreement provided that the tenant was to have the right to continue renting the shop-house so long as he liked if there was no default in the payment of rent. The tenant claimed that he had paid a non-refundable premium to Batcha Sahib for the procurement of the right. However, a written agreement entered into between the tenant and the landlords (who had bought the said premises in May 1966 from one Khoo Boon Yoke who had purchased the said premises from Batcha Sahib in 1961) in August 1977, did not make any reference to any non-refundable premium paid by the defendant or to any equity.

An application for summary judgment was made and it was adjourned into open Court on 16 November 1983, judgment delivered in Open Court on 20 November 1983 and order made for final judgment for possession and double rent. On 23 November 1983, the tenant applied for a further hearing or for a certificate under s. 68 of the Courts of Judicature Act 1964 ("the Act"). The Senior Assistant Registrar was instructed to list the matter for further argument. Meanwhile, the landlords had applied for a writ of possession, and the tenant had applied for stay of execution pending the disposal of the appeal. Submissions were directed to be made in Open Court.

Held:**A. Grounds on which Summary Judgment for repossession had been granted.**

[1] The parties were bound by the terms of the tenancy agreement of 1977. That tenancy agreement was intended to contain all the terms agreed upon by the parties.

[2] The tenant's contention that he had some equity against the landlords was without substance.

B. Tenant's application for certificate under s. 68, Courts of Judicature Act 1964

[1] Section 68(2) of the Act did not cover the case before the Court. The order of 20 November 1983 was not an order in chambers but in open Court.

[2] Therefore, the direction to the Senior Assistant Registrar and the notice of hearing in open Court were nullities.

- a** [3] In the circumstances of the case, an order should be made for a stay of execution pending the disposal of an application to appeal out of time by the tenant.

[Order made accordingly.]

Case referred to:

Setali Development Sdn. Bhd. and Anor. v. Lim You Keng [1984] 1 MLJ 26

- b** **Legislation referred to:**

Courts of Judicature Act 1964, s. 68.

Rules of the High Court 1980, O. 32 r. 11.

For the plaintiffs - C. C. Koh; M/s. Lim & Teng

For the defendant - S Balasekaran; M/s. Bala & Co.

- c** **JUDGMENT**

Mahadev Shankar J:

- d** This is an action by the plaintiffs, Woon Soon Fatt and Woon Chee Meng (hereafter referred to as the landlords) for repossession of a three-storey shop-house No. 51 Jalan Mersing. Kluang (hereafter referred to as the said premises). The defendant Chong Yong (the “tenant”) was at all material times the tenant of the said premises until 29 February 1983.

From that date onwards the landlords claimed that he was a trespasser in the said premises.

The tenant claims that he has an equity in the said premises which entitles him to carry on in occupation thereof as long as he likes.

- e** The tenant’s claim has its roots in a written agreement between him and one N. Batcha Sahib dated 14 February 1954 when the latter as the owner of the premises agreed to let out the same to the tenant at a monthly rental of RM250 with a provision in the tenancy agreement that “the tenant shall have the right to continue renting all the said shop-house as long as he likes if there is no default made in the regular payment of the rent.”

- f** The tenant avers in the proceedings before me that for the procurement of this right he paid a sum of RM20,000 to En. N. Batcha Sahib as a non-refundable premium.

According to the tenant, the said premises were sold by Mr. Batcha Sahib to one Khoo Boon Yoke in 1961. The actual details of the sale are not before me but the tenant avers that after this sale he continued in occupation of the said premises.

In May 1966 this Khoo Boon Yoke is said to have sold the premises to the landlords.

- g** On the 18 August 1977 the landlords entered into formal written agreement with the tenant (hereafter referred to as the tenancy agreement).

In entering into this tenancy agreement the tenant was represented by an advocate and solicitor Mr. Yee Foong Mee who also witnessed his signature thereto. The tenancy agreement made absolutely no reference to any non-refundable premium paid by the defendant to Batcha Sahib nor did it refer to any equity of the tenant to occupy the premises for as long as he likes.

- h** On the contrary the tenancy agreement specifically provided that the tenant was to hold the premises for a period of 3 years only from 1 March 1977 to 29 February 1980 at a rental of RM520 per month payable in advance.

- i**

There was an option to renew for a further period of 3 years until determined upon such terms and conditions to be mutually agreed upon by the parties hereto.

a

When this agreement expired on 28 February 1980 it was renewed for a further 3 years but at an increased rental of RM700 per month.

On 22 September 1982 the landlords did through their solicitors send an AR Registered Notice to the tenant whereby he was given notice that the landlords desired to repossess the said premises on the termination of the tenancy agreement and gave the tenant notice to vacate.

b

To this notice the tenant made no reply whatsoever.

On 11 April 1983 the landlords filed a writ for vacant possession, *mesne* profits, interest and costs.

The tenant's response was to enter an appearance and to pay into Court at the rate of RM700 only per month as from March 1983. On 23 May 1983 he filed a defence and counter-claim.

c

The effect of the defence basically was to contend that by reason of the non-refundable premium of RM20,000 paid to Batcha Sahib and the Tenant's continued occupation of the premises thereafter, an equity had come into existence or alternatively an equitable estoppel which had the effect of protecting his continued occupation of the premises. The other defences taken were minor variations of this theme made for a declaration that the agreement between the tenant and Batcha Sahib was binding on the landlords and should be specifically enforced.

d

The landlord's response to this was a categorical denial that they knew anything about the defendant's private arrangements with Batcha Sahib and an averment that they were in no way bound thereby. They staked their position on the terms and conditions of the Tenancy Agreement under which they averred that the tenant's rights had terminated by an effluxion of time and that vacant possession and the other orders that they sought should necessarily follow.

e

After I heard the submissions made by Counsel on both sides and considered the authorities submitted I was left in no doubt that the landlords were entitled to succeed in their application for summary judgment.

f

Such an application had initially come on for hearing in Chambers on 12 November 1983. As it appeared that the arguments would take some time the matter was adjourned into Open Court on 16 November 1983.

Judgment was reserved and delivered in Open Court on 20 November 1983.

g

I then ordered that the landlords do have final judgment against the tenant for immediate possession of the said premises and further ordered that the tenant do pay double rent at RM1,400 per month from the 1st March 1983 until delivery of vacant possession and further that the tenant do pay interest at the rate of 8% per annum on the double rent ordered up to realisation giving the plaintiffs an option to apply for an Order to charge the defendants with double the value of the premises from 1 December 1983 up to the date on which possession of the premises is actually handed over by the defendant to the plaintiff.

h

I said in Open Court that I would give full reasons in writing for making these orders in the event that a Notice of Appeal is filed.

i

- a** On 23 November 1983 the tenant's solicitors handed in a letter stating that they were dissatisfied with my decision given on 20 November 1983 and applied for a further hearing stating that if I did not require further argument the tenant would be grateful if a certificate could be issued under s. 68 of the Courts of Judicature Act 1964 hereafter referred to as the Act.
- b** Owing to an administrative error this letter did not come to my attention until 18 February 1984 when I instructed the Senior Assistant Registrar to list this matter for further argument soonest possible. The direction was made under the misconception that the letter related to a Chamber matter.
- The Senior Assistant Registrar accordingly issued a notice to the parties dated 1 March 1984 stating that this matter had been fixed for hearing on 2 April 1984. In the meantime the
- c** landlords had on 11 February 1984 taken out a summons-in-chambers applying for a writ of possession of the said premises in order to enforce the order made on 20 November 1983. The tenant on the other hand also took a summons-in-chambers dated 28 February 1984 in which he applied for execution to be stayed pending the disposal of the appeal. Both summonses were fixed for hearing on 24 March 1984. The parties were directed however to make their submissions in Open Court on 4 April 1984. The tenant's solicitor was specifically
- d** requested to come prepared to clarify what certificate was required under s. 68 (2) of the Act when it was quite apparent that the Order made on 20 November 1983 was a final order made in Open Court.
- Accordingly the representations of Counsel for both parties were heard on that day. Mr. Bala of Counsel for the tenant drew my attention to *Setali Development Sdn. Bhd. and Anor. v. Lim You Keng* [1984] 1 MLJ at p. 26 and also to O. 32 r. 11 of the Rules of the High
- e** Court. He seemed to suggest that it was open to me to adjourn this matter back from Open Court into Chambers so as to furnish him with an opportunity to argue the matter further and in so doing to open the way for him to initiate an appeal within time to the Federal Court.
- I have listened to his submission with great interest but with some regret I feel compelled to
- f** hold that s. 68 (2) of the Act does not cover this case as the Order made on 20 November 1983 was not an Order made in Chambers but clearly an order made in Open Court. The proper procedure for the defendant if he was dissatisfied with that Order was to promptly initiate an appeal to the Federal Court.
- The defendant's solicitors' letter dated 23 November 1983 requesting a certificate was obviously written under a misapprehension that a matter adjourned from Chambers into Open
- g** Court such as this was still a chamber matter upon which there could be further argument.
- To some extent I must confess that this misapprehension was compounded by a lapse on the part of the Court in not promptly rejecting the application and pointing out that it was misconceived. The error was further compounded by the direction by me to the Senior Assistant Registrar and the issue of the notice aforesaid that the matter had been fixed for
- h** hearing in Open Court.
- In the light of the clear provisions of s. 68(2) of the Act it is clear in law that the direction to the Senior Assistant Registrar and the notice of hearing in Open Court were nullities.
- But that does not assist the tenant/defendant from extricating himself from quagmire in which he now finds himself.
- i**

This is so because the High Court does not have the power to extend the time within which an appeal can be brought. Rule 56 of the Federal Court Rules PU (A) 33 of 1980 clearly provides that leave of the full Federal Court is required for appeals to be brought after the expiration of one month.

a

Mr. Bala has pointed out by way of additional mitigation that the case of *Setali Development Sdn. Bhd. v. Lim You Keng* was only reported in the January 1984 issue of the MLJ.

b

In the circumstances I felt that the ends of justice would be met by making an Order for a stay of execution pending the disposal of an application to appeal out of time by the tenant/defendant such application to be filed within 2 weeks from 4 April 1984. The stay of execution was ordered on terms that the tenant/defendant will deposit the full amount of the double rent RM1,400 per month from 1 March 1983 up to date into a joint bank account in the names of the solicitors of both parties in this matter with further payments to be made into the said account as and when they become due until the disposal of the application for leave to appeal out of time and any appeal permitted pursuant thereto.

c

In all the circumstances it is now desirable that I set out the grounds on which I granted the summary judgment in this case.

I hold as a fact that when the Tenancy Agreement was entered into the parties intended that all the terms which they were agreeing to between themselves should be contained in the Tenancy Agreement.

d

This being so it follows that both parties are bound by the terms of the Tenancy Agreement and the Court should give full effect thereto.

I further hold that the defendant's contention that he had some equity in the premises as against the landlords in this action is without substance.

e

Whilst such an equity, even if it existed may have been operated against Batcha Sahib (and I do not need to make any finding of that) there is no evidence before me which can support a contention that such equity is effective against the landlords.

They knew nothing about it, and even if it could by some stretch of imagination be held that they did know, I hold that such knowledge was irrelevant once the Tenancy Agreement was executed.

f

If the parties intended such an equity to continue it would have been incorporated into the Tenancy Agreement. It was not. What is more the rental was wholly changed and the tenancy was for a fixed term of years with an option to renew for a further fixed term of years, after which there was no further option to renew.

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This Tenancy Agreement was thus for a lease of a definite duration of 6 years maximum, and not for "as long as the tenant likes."

One must add to this the significant fact that the defendant/tenant was represented by his advocate and solicitor. By way of corroboration that the defences now taken may be aningenious after-thought we have the glaring omission on the part of the defendant to make any protest whatsoever when he was served with the notice to quit on 22 September 1982. Had he for a moment believed in any equity or estoppel as so eloquently pleaded in his defence and counter-claim the normal course of business dealing would surely have resulted in the most vehement protest.

*h**i*

a Finally there is evidence of the plaintiff's valuer that a fair rental value of these premises on 4 April 1983 was RM1,700 per month. Even double rent is therefore inadequate compensation for the loss to which the landlord is being put by the continued deprivation of these premises.

b It is for this reason that my Orders for 20 November keeps open the landlords' option to charge double value. I do not see that there is anything more useful that I can add and the outcome of this matter must now await the result of the defendant/tenant's application for leave to appeal out of time.

Also found at [1984] 2 CLJ 306

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